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IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Complaint

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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June 7, 2007

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE COMPLAINT

COMPLAINT

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

APPENDIX:

EXHIBITS

STATUTORY PROVISIONS INVOLVED

IN THE

Supreme Court of the United States

No. ____, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of South Carolina, by its Attorney General, Henry Dargan McMaster, and pursuant to Rule 17 of the Supreme Court's Rules, moves this Court for leave to file its Complaint against the State of North Carolina, for the reasons stated in the accompanying brief in support.

Respectfully submitted,

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No. ____, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

COMPLAINT

The State of South Carolina, by its Attorney General, Henry Dargan McMaster, brings this suit against the State of North Carolina, and for its cause of action states as follows:

1. The Catawba River is an interstate river that originates in the mountains of North Carolina and flows through a series of lakes — including Lake Wylie, where it enters South Carolina — and unimpounded stretches for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River in South Carolina.

2. The Catawba River is essential to the generation of hydroelectric power, economic development and commerce, and recreation in the area of South Carolina within the Catawba River Corridor and Basin. Yet the Catawba River is subject to severe periodic fluctuations in water level that can render its volume inadequate. The normal flow of the River has been significantly affected by severe droughts. Indeed, both North Carolina and South Carolina have issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist. The most recent prior drought lasted from 1998 through 2002.

3. In 1991, North Carolina enacted an "interbasin transfer statute" that purports to authorize the transfer of large volumes of water from one river basin in North Carolina to another basin in that State. Under that statute, North Carolina has authorized the transfer of at least 48 million gallons per day from the Catawba River Basin, with the most recent such transfer authorized in January 2007.

4. These past transfers — and threatened pending transfers — exceed North Carolina's equitable share of the Catawba River. Because efforts at resolving this dispute through negotiation of an interstate compact have proved fruitless, South Carolina brings this Complaint for this Court to adjudicate the parties' dispute, to determine (with the assistance of a Special Master) the equitable apportionment of the Catawba River, and to enjoin North Carolina from authorizing past or future transfers inconsistent with that apportionment.

PARTIES

5. The State of South Carolina brings this suit in its capacity as sovereign and as *parens patriae* on behalf of its citizens.

6. The State of North Carolina has authorized interbasin transfers from the Catawba River through an act of its legislature and the actions of a state agency, the North Carolina Environmental Management Commission ("EMC"), which is equivalent to the State itself for purposes of this Court's jurisdiction.

JURISDICTION

7. The exclusive and original jurisdiction of this Court over controversies between two States is invoked under Article III, § 2, clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a). This Court has long recognized that it has "a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

THE CATAWBA RIVER BASIN

8. The Catawba River originates in the mountains of North Carolina. The mainstem of the River in North Carolina is almost entirely impounded by a series of seven hydropower reservoirs running from Lake James, located at the foot of the Blue Ridge Mountains, to Lake Wylie, which extends across the state boundary with the State of North Carolina near Charlotte, North Carolina.

9. The Catawba River enters the State of South Carolina through Lake Wylie. Allison Creek flows into the midlake region of Lake Wylie within South Carolina. The Catawba River flows out of Lake Wylie and is joined by Sugar Creek, Twelvemile Creek, and Cane Creek before draining into Fishing Creek Reservoir. The Catawba River flows out of Fishing Creek Reservoir and joins with Fishing Creek to flow into Great Falls Reservoir. The River then joins with Camp Creek and Rocky Creek to form Cedar Creek Reservoir. Cedar Creek flows into the Catawba River just below the Cedar Creek Reservoir dam. The Catawba River joins Big Wateree Creek to form the Wateree River, which flows through Lake Wateree. Grannies Quarter Creek and Sawneys Creek flow into the Wateree River downstream of Lake Wateree. Twentyfive Mile Creek and Big Pine Tree Creek enter the Wateree River near the City of Camden, followed by Swift Creek, Spears Creek, and Colonels Creek before merging with the Congaree River Basin to form the Santee River Basin.

10. The Catawba River Basin is the most densely populated river basin in the two States. That region includes the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which includes both North Carolina and South Carolina and is home to nearly 1.6 million people. The Catawba River Corridor in South Carolina includes York, Lancaster, and Chester Counties, contains nearly 300,000 people, and is expected to have significant growth over the next decade. The Catawba River Basin, which bisects the north-central portion of South Carolina, includes portions of eight South Carolina counties — most

of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties.

11. The Catawba River serves a wide variety of North Carolina and South Carolina water-use purposes, including: aquaculture; golf course irrigation; hydroelectric water use; industrial water use; irrigation water use; mining process; thermoelectric water use; and water supplies.

12. As the North Carolina Division of Water Quality noted in 1995, the water quality of the Catawba River may be jeopardized by growth in the surrounding area. As of that year, 16 percent of the Catawba River Basin's nearly 3,100 miles of free-flowing rivers and streams were considered impaired due to pollution. In that 1995 report, the North Carolina Division identified eight major water-quality issues in the Basin, which include:

a) Nutrient inputs to lakes from both point and nonpoint sources;

b) Sedimentation in streams and lakes from urban runoff, construction, and agriculture;

c) Lack of assimilative capacity for oxygen-consuming wastes in streams and lake coves from wastewater treatment plant discharges;

d) Stream water quality impairment from urban stormwater runoff;

e) Health concerns associated with fecal coliform bacteria;

f) Toxicity from heavy metals and its impacts on aquatic life and water supplies;

g) Discharges of colored effluent from wastewater treatment plants; and

h) Enforcement of water-quality regulations and compliance with discharge permits.

13. Of particular relevance to the current dispute, the North Carolina Division recognized that solving these problems is beyond the capabilities of any one agency or

group and that cooperative efforts between the various stakeholders in the Catawba River Basin will be necessary to protect the Basin's water resources.

14. Such a multi-stakeholder negotiation process occurred recently, involving the Federal Energy Regulatory Commission, Duke Energy (which generates hydroelectric power from the Catawba River), and groups from South Carolina and North Carolina. Although more water may be necessary to sustain South Carolina's needs, it was agreed through those negotiations that the minimum continuous flow that South Carolina should receive from the Catawba River is 1,100 cubic feet per second — or about 711 million gallons per day. *See* App. 15, 36-37.

15. The Catawba River, however, is subject to severe periodic fluctuations in water level, and there are periods when the River does not have even minimally adequate flows. *See* App. 14-21. Indeed, a gauge that has long measured the daily flow of the Catawba River into South Carolina has found the average daily flow to be as low as 132 cubic feet per second — or only about 85 million gallons per day. *See* App. 16-17, 21. That gauge has recorded average minimum daily flows that range from roughly 400 to 700 cubic feet per second nearly every day of the year. *See id.* Indeed, there are only two calendar days on which the minimum daily average flow recorded over a 64-year period has always been above 1,100 cubic feet per second. *See id.*

16. In addition, as part of the multi-stakeholder negotiation process discussed in paragraph 14, Duke Energy developed a model to estimate the natural flow of the Catawba River, as if the lakes used to generate hydroelectric power were not there. *See* App. 15. Those data show that the Catawba River, even in its "natural" state, often would not deliver 1,100 cubic feet per second of water into South Carolina. *See* App. 15, 18, 36-37. From 1930 through 2002, that model estimates that the average daily flow would be below the 1,100 cubic feet per second on at least one day of the year — and as many as 104 days (in

2002) — in 61 of those 72 years, and in 17 of the last 20. *See* App. 15, 18.

17. The Catawba River has also been subjected to prolonged droughts in the mid-1950s, the late 1980s, and from 1998 through 2002; and it is currently experiencing moderate drought conditions today. *See* App. 15. During the drought that ended in late 2002, South Carolina and its citizens suffered numerous harms, including:

a) Major boat landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38.

b) Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38.

c) Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric stations located on the Catawba River. *See id.*

d) Businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than $6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39.

e) The flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

NORTH CAROLINA'S UNLAWFUL AUTHORIZATION OF TRANSFERS FROM THE CATAWBA RIVER

18. The harms to South Carolina from reduced flow in the Catawba River have been exacerbated by the "inter-basin transfer statute" that North Carolina enacted in 1991 and that applies by its express terms to the Catawba River. *See* N.C. Gen. Stat. Ann. § 143-215.22G(1)(h). Any "person" wishing to "transfer . . . 2,000,000 gallons of water or more per day" from a river basin must obtain a permit from the North Carolina EMC. *See id.* § 143-215.22I(a)(1)-(2). Transfers of less than 2 million gallons of water per day are implicitly authorized to occur without regulation by the EMC.

19. The North Carolina statute contains no provisions requiring a reduction in the amount of water transferred in the event of a drought or natural fluctuations in the flow of the Catawba River that limit the water available to downstream users in South Carolina. On the contrary, the statute allows the EMC to remedy "water supply problems" in North Carolina that are "caused by drought" by "grant[ing] approval for a temporary transfer." *Id.* § 143-215.22I(j).

20. The EMC has granted at least two permits under § 143-215.22I that have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River:

a) In March 2002, the EMC granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. This permit, moreover, was granted in the midst of the severe drought affecting the Catawba River from 1998 through 2002, and these inequitable withdrawals of water from the Catawba River necessarily exacerbated the harms that drought was imposing on South Carolina and its citizens.

b) In January 2007, the EMC granted the application by the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. The EMC granted that application over the objection of South Carolina, which noted, among other things, that the Cities' application and the EMC's environmental impact statement gave no consideration to the effects of the transfer on uses of the Catawba River in South Carolina. The EMC also approved the transfer despite the availability of alternative sources of water from other communities in North Carolina that stood ready, willing, and able to provide that water to the Cities of Concord and Kannapolis.

21. The statute also grandfathers the transfer by Union County of at least 5 million gallons per day from the Catawba River Basin. In addition, pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin.

22. South Carolina does not know the extent to which the North Carolina statute has implicitly permitted one or more transfers of less than 2 million gallons per day from the Catawba River.

23. South Carolina also does not know the extent to which entities within North Carolina have taken advantage of § 143-215.22I(b), which authorizes transfers without a permit from the EMC up to the full capacity of any facility that was existing or under construction on July 1, 1993.

24. The transfers of water out of the Catawba River that the EMC has approved and the North Carolina statute has permitted necessarily reduce the amount of water available to flow into South Carolina. Such transfers exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina and cause the harms detailed above. Those transfers also

are in excess of North Carolina's equitable share of the Catawba River.

25. North Carolina's interbasin transfer statute "cannot be used" to resolve this dispute, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981), because, in "interstate water disputes," "federal common law applies" and "our federal system does not permit the controversy to be resolved under state law," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981).

NORTH CAROLINA'S REFUSAL TO AMELIORATE THE HARMS TO SOUTH CAROLINA

26. On October 31, 2006, South Carolina formally opposed the request of the Cities of Concord and Kannapolis for authority to transfer tens of millions of gallons of water per day from the Catawba River. That opposition expressly noted that the proposed transfer would both adversely affect the water quantity and quality in the South Carolina portion of the Catawba River and impair the affected South Carolina communities' ability to sustain future population growth, to attract new industry and maintain current businesses, to provide adequate drinking water, to protect the local wildlife, and to accommodate recreation. *See* App. 1-6.

27. On December 19, 2006, South Carolina Attorney General Henry McMaster wrote to North Carolina Attorney General Roy Cooper reiterating South Carolina's opposition to the proposed transfer. South Carolina also proposed to North Carolina that the EMC suspend its ongoing proceeding on the Cities' application while officials of North Carolina and South Carolina sought to negotiate an interstate compact addressing this issue, along with other water issues. Attorney General McMaster noted that, because growth in the Southeast would likely lead to such questions arising with increasing frequency, an interstate compact would be wiser and less costly to the taxpayers than litigating each question as it arises. *See* App. 7-8.

28. On January 3, 2007 — one week before the EMC's scheduled resolution of the Cities' application — North Carolina Attorney General Cooper responded. In that letter, Attorney General Cooper stated that he had forwarded the letter to Governor Mark Easley and the North Carolina Secretary for Human Resources, but made no mention of negotiating an interstate compact or delaying action on the Cities' application. *See* App. 9-10. The Cities' application was granted on January 10, 2007.

29. In granting the application, the EMC also failed to heed a resolution of the Catawba/Wateree River Basin Bi-State Advisory Commission ("Commission"), which includes elected state officials from both South Carolina and North Carolina. *See* App. 25. On January 8, 2007, the Commission had recommended that the EMC delay action on the Cities' application for at least six months to provide time for negotiation of an interstate compact to resolve the interstate dispute about the Cities' proposed transfer. *See* App. 26-27, 29-30.

PRAYER FOR RELIEF

WHEREFORE, the State of South Carolina prays:

1. That the Court enter a decree declaring that the North Carolina interbasin transfer statute cannot be used to determine each State's share of the Catawba River and equitably apportioning the Catawba River.

2. That the Court enter a decree enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that apportionment, and also declaring that the North Carolina interbasin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree.

3. For such other and further relief as the Court may deem proper.

Respectfully submitted,

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June 7, 2007

QUESTION PRESENTED FOR REVIEW

Whether North Carolina's interbasin transfer statute is invalid under the Supremacy Clause of the United States Constitution and the constitutionally based doctrine of equitable apportionment because North Carolina, pursuant to that statute, has authorized and continues to authorize transfers of water from the Catawba River in excess of its equitable share of the waters of that interstate river, thereby harming South Carolina and its citizens.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Catawba River 3

B. The North Carolina Interbasin Transfer Statute 6

C. Events Leading To This Dispute 8

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. FEDERAL COMMON LAW PRECLUDES RESORT TO THE NORTH CAROLINA INTERBASIN TRANSFER STATUTE FOR RESOLUTION OF THIS DISPUTE 10

II. SOUTH CAROLINA IS ENTITLED TO AN EQUITABLE APPORTIONMENT OF THE CATAWBA RIVER, AND NORTH CAROLINA SHOULD BE ENJOINED FROM AUTHORIZING TRANSFERS FROM THE RIVER THAT ARE INCONSISTENT WITH THAT APPORTIONMENT 11

III. THE COURT SHOULD APPOINT A SPECIAL MASTER 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California:

373 U.S. 546 (1963) 2

460 U.S. 605 (1983) 13

Arkansas v. Texas, 346 U.S. 368 (1953) 2

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 10

Colorado v. Kansas, 320 U.S. 383 (1943) 13

Colorado v. New Mexico:

459 U.S. 176 (1982) 11, 12, 13

467 U.S. 310 (1984) 11, 13

Connecticut v. Massachusetts, 282 U.S. 660 (1931) ... 10, 13

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 10

Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983) 11, 12, 13

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 10

Jones v. Duke Power Co., 501 F. Supp. 713 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) 3, 4

Kansas v. Colorado, 206 U.S. 46 (1907) 10, 11, 13

Nebraska v. Wyoming:

325 U.S. 589 (1945) 12, 13

507 U.S. 584 (1993) 13

South Carolina v. Regan, 465 U.S. 367 (1984) 14

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 10

United States v. Raddatz, 447 U.S. 667 (1980) 14

Virginia v. Maryland, 540 U.S. 56 (2003) 11
Wyoming v. Colorado, 259 U.S. 419 (1922) 12, 13

CONSTITUTION AND STATUTES

Federal

U.S. Const.:
Art. I, § 8, cl. 3 (Commerce Clause) 11
Art. III, § 2, cl. 2 2
Art. IV, § 2 (Supremacy Clause) i
28 U.S.C. § 1251(a) 2

North Carolina

N.C. Gen. Stat. Ann.:
§ 143-215.22G 2
§ 143-215.22G(1)(h) 6
§ 143-215.22G(3) 6
§ 143-215.22I 2
§ 143-215.22I(a)(1)-(2) 6
§ 143-215.22I(b) 6
§ 143-215.22I(f) 7, 12
§ 143-215.22I(i) 6
§ 143-215.22I(j) 7, 12

South Carolina

S.C. Code Ann. §§ 49-21-10 *et seq.* 7

LEGISLATIVE MATERIALS

VII *The Statutes at Large of South Carolina* (David J. McCord ed., 1840) 3

ADMINISTRATIVE MATERIALS

North Carolina Drought Management Advisory Council, http://www.ncdrought.org 5

South Carolina State Climatology Office, http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php 5

South Carolina Water Resources Commission, Class I Interbasin Transfer Permit, No. 29 WS01 S02 (May 8, 1989) 8

U.S. Census Bureau:

http://www.census.gov/popest/counties/files/CO-EST2006-ALLDATA.csv 4

http://www.census.gov/population/estimates/metro_general/2006/CBSA-EST2006-alldata.csv 4

INTRODUCTION

The Catawba River originates in the North Carolina mountains and winds 225 miles into South Carolina, crossing the border at Lake Wylie. Both States historically have relied on the Catawba River for hydroelectric power, economic development and commerce, and recreation in an area encompassing more than 1.5 million people and the Charlotte metropolitan area, which spans both States. Yet the flow of the Catawba River is unreliable and subject to scarcity in times of drought, most recently in 1998 through 2002, which created a crisis for South Carolinians dependent upon the River.

Despite the history of shared use and benefit of the Catawba River, in 1991 North Carolina enacted a statute by which persons could transfer up to 2 million gallons of water per day out of the Catawba River Basin and into basins of other rivers in North Carolina, without the prior authorization of that State's officials. In addition, pursuant to that statute, North Carolina has affirmatively authorized the transfer of at least 48 million gallons per day from the Catawba River Basin to basins of other rivers in North Carolina. The most recent such transfer was authorized in January 2007, and a pending application seeks authority to transfer an additional 13 million gallons per day from the Catawba River. These past and threatened future transfers exceed North Carolina's equitable share of the Catawba River and directly harm South Carolina and its citizens, severely reducing the flow of water available for the generation of hydroelectric power, economic development and commerce, and recreation.

South Carolina has attempted to resolve this dispute through negotiations and establishment of an interstate compact, but North Carolina has not been receptive to such efforts and, instead, has continued to authorize diversions from the Catawba River. South Carolina, therefore, has no means of preventing and undoing North Carolina's unlawful appropriation of the waters of the Catawba River other than invocation of this Court's original

jurisdiction. South Carolina, therefore, seeks leave to file a complaint, in which it seeks an equitable apportionment of the Catawba River and an order both enjoining North Carolina from authorizing transfers of water from the River inconsistent with that apportionment and preempting North Carolina's transfer statute to the extent it purports to authorize such transfers.

JURISDICTION

This case, involving a dispute between two sovereign States[1] over an interstate river, falls squarely within this Court's exclusive and original jurisdiction over controversies between two States under Article III, § 2, clause 2 of the United States Constitution and 28 U.S.C. § 1251(a). Indeed, this Court has long recognized that it has "a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, clause 2 of the United States Constitution provides in relevant part:

> The judicial Power shall extend . . . to Controversies between two or more States[.]

Section 1251(a) of Title 28, United States Code, provides:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Sections 143-215.22G and 143-215.22I of the General Statutes of North Carolina are reproduced at App. 43-52.

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[1] An agency of the State is the State itself for purposes of original jurisdiction. *See Arkansas v. Texas*, 346 U.S. 368, 370-71 (1953).

STATEMENT OF THE CASE

A. The Catawba River

The Catawba River originates in the mountains of North Carolina and flows through a series of lakes — including Lake Wylie, where it enters South Carolina — and unimpounded stretches for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River. *See* Compl. ¶ 1. The Catawba River has long been viewed as important to both South Carolina and North Carolina. In 1787, recognizing the possibilities for the River's development, the South Carolina legislature established a company to open the River "from the North Carolina line to the Camden Ferry, by means of canals, dams and locks." VII *The Statutes at Large of South Carolina* 549 (David J. McCord ed., 1840). North Carolina likewise established a "private company . . . to improve the Catawba for navigation." *Jones v. Duke Power Co.*, 501 F. Supp. 713, 718 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) (table). These efforts ultimately proved unsuccessful, due in part to the "severe periodic fluctuations in water level" of the River and its "inadequate water volume at ordinary stages," which "rendered the river unfit for navigation in its natural state and an unworthy candidate for improvements to make it fit for navigation in the future." *Id.* at 717.

Despite these setbacks, it would soon be realized that the Catawba River's future in enhancing progress in the Carolinas lay not in making the River navigable in the nineteenth century, but in harnessing its potential for electrical power in the twentieth. Beginning in the 1890s — an era in which textile mills began to flourish throughout the South — a company, later known as Duke Power (now Duke Energy), was founded. That company came into being principally to provide power to the Piedmont's fledgling cotton mills. Today, Duke Energy owns and operates a system of 11 reservoirs — six in North Carolina, four in South Carolina, and one in Lake Wylie, on the border of the two States — in the Catawba-Wateree

Basin, which provides hydroelectric power to the region. *See* App. 14.

That region includes the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which includes both North and South Carolina and is home to nearly 1.6 million people.[2] The Catawba River Corridor in South Carolina includes York, Lancaster, and Chester Counties, contains nearly 300,000 people, and is expected to have significant growth over the next decade.[3] The Catawba River Basin, which bisects the north-central portion of South Carolina, includes portions of eight South Carolina counties — most of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties.

The Catawba River is key to the economic development of these portions of South Carolina, a historically underdeveloped area, and currently supports a number of major industries, including Bowater, Inc., Tyco Electronics, Inc., Springs Global US, Inc., and Celanese Advanced Materials, Inc. Indeed, the Catawba River Basin is today the fastest growing sub-region in the Carolinas, and the River serves a wide variety of North Carolina and South Carolina water-use purposes, including aquaculture; golf course irrigation; hydroelectric water use; industrial water use; irrigation water use; mining process; thermoelectric water use; and water supplies. The River now provides drinking water for and receives waste discharges from 14 counties, 22 municipalities and two States — North Carolina and South Carolina.

The same "severe periodic fluctuations in water level" and "inadequate water volume at ordinary stages" that rendered the Catawba River unfit for navigation, *Duke Power*, 501 F. Supp. at 717, however, continue today. A

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[2] *See* http://www.census.gov/population/estimates/metro_general/2006/CBSA-EST2006-alldata.csv.

[3] *See* http://www.census.gov/popest/counties/files/CO-EST2006-ALLDATA.csv; Compl. ¶ 10.

streamflow gauge has been in operation from 1942 to the present below Lake Wylie, which straddles the North Carolina-South Carolina boundary and is where the Catawba River enters South Carolina. *See* App. 15-16. Measurements taken from that gauge show that the daily flow of the Catawba River into South Carolina has fluctuated widely and has been as low as 132 cubic feet per second (January 7, 2002).[4] *See* App. 16-17, 21; *see also* App. 20 (showing daily average flows for the entire year 2001, which ranged from nearly 7,000 cubic feet per second to less than 250 cubic feet per second). Further evidence comes from a model that Duke Energy developed during proceedings before the Federal Energy Regulatory Commission to estimate the natural flow of the Catawba River, as if the lakes used to generate hydroelectric power were not there. *See* App. 15. Those data show that the Catawba River, even in its "natural" state, often would not deliver the 1,100 cubic feet per second of water into South Carolina that a negotiated process involving Duke Energy and groups from South Carolina and North Carolina agreed was the minimum continuous flow that South Carolina should receive from the Catawba. *See* App. 15, 18; *see also* App. 36-37.

In addition, the Catawba River has been subjected to prolonged droughts in the mid-1950s, the late 1980s, and from 1998 through 2002. *See* App. 15. Both North Carolina and South Carolina have recently issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist.[5] The effects of the drought that ended in 2002 were particularly severe on South Carolina. Major boat

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[4] One cubic foot per second is equivalent to about 646,000 gallons per day. Ten million gallons per day is equivalent to about 15.5 cubic feet per second.

[5] *See* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited June 6, 2007); South Carolina State Climatology Office, http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php.

landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38. Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric stations located on the River. *See id.* And businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than $6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39. Indeed, the flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

B. The North Carolina Interbasin Transfer Statute

In 1991, North Carolina enacted a statute governing transfers of water — that is, the "withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a[nother] river basin." N.C. Gen. Stat. Ann. § 143-215.22G(3). The statute applies to a large number of enumerated rivers, including the Catawba River. *See id.* § 143-215.22G(1)(h). Any "person" wishing to "transfer . . . 2,000,000 gallons of water or more per day" from a river basin must obtain a permit from the North Carolina Environmental Management Commission ("EMC"). *Id.* § 143-215.22I(a)(1)-(2). Transfers of less than 2 million gallons of water per day are implicitly authorized to occur without the EMC's prior approval. The statute also grandfathers both previously approved certificates for transfer and pre-existing water-transfer facilities, which may increase their transfers up to their full capacity without obtaining approval from the EMC. *See id.* § 143-215.22I(b), (i).

The North Carolina statute prescribes a number of factors that the EMC must consider in granting a permit, all of which on their face pertain only to North Carolina's interests. Thus, the EMC is directed to consider, among

other things, the "necessity, reasonableness, and beneficial effects" of the "proposed uses" of the transferred water and the possible "detrimental effects on" the "source river basin" and the "receiving river basin" in North Carolina. *Id.* § 143-215.22I(f). The North Carolina statute contains no provisions requiring a reduction in the amount of water transferred in the event of a drought that limits the water available to downstream users in South Carolina. On the contrary, the statute allows the EMC to remedy "water supply problems" in North Carolina that are "caused by drought" by "grant[ing] approval for a temporary transfer." *Id.* § 143-215.22I(j).

The EMC has granted at least two permits that have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River. For example, in March 2002, the EMC granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. *See* Compl. ¶ 20(a). In January 2007, the EMC granted the application by the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. *See id.* ¶ 20(b). The EMC granted this application over the objection of South Carolina, which noted, among other things, that the Cities' application and the EMC's environmental impact statement gave no consideration to the effects of the transfer on uses of the Catawba River in South Carolina. *See id.* Pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin. *See id.* ¶ 21.[6]

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[6] In 1989, the South Carolina Water Resources Commission had, pursuant to South Carolina Code Annotated §§ 49-21-10 *et seq.*, authorized both Lancaster County, South Carolina, and Union County, North Carolina — which jointly own a water treatment plant located in South Carolina on Lake Wylie, from which both counties derive their

Those transfers of water out of the Catawba River necessarily reduce the amount of water available to flow into South Carolina, exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina, and cause the harms detailed above.

C. Events Leading To This Dispute

As noted above, South Carolina actively opposed the most recent application for a grant of authority to transfer water out of the Catawba River. In December 2006, Henry McMaster, the South Carolina Attorney General, wrote to his North Carolina counterpart, Roy Cooper, reiterating South Carolina's opposition to the Cities' application, as also expressed by Governor Mark Sanford and South Carolina's members of Congress. *See* App. 7. Attorney General McMaster noted that, while litigation in this Court was an option, South Carolina's preferred option was to have the officials of the two States negotiate an interstate compact, with the EMC staying its hand pending the outcome of those negotiations. *See* App. 7-8. On January 3, 2007 — one week before the EMC's scheduled resolution of the Cities' application — North Carolina Attorney General Cooper responded that he had forwarded the letter to Governor Mark Easley and the North Carolina Secretary for Human Resources. *See* App. 9-10. The response made no mention of any willingness to negotiate an interstate compact or to delay action on the Cities' application.

On January 8, 2007, the Catawba/Wateree River Basin Bi-State Advisory Commission ("Commission"), which includes elected state officials from both South Carolina and North Carolina, passed a resolution recommending that the EMC delay action on the Cities' application for at

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water supply — to transfer a maximum of 20 million gallons of water per day from the Catawba River. That permit, however, requires both counties to decrease or cease their withdrawal from the Catawba River, when necessary to maintain a sufficient flow of water downstream of Lake Wylie. *See* Class I Interbasin Transfer Permit, No. 29 WS01 S02 (May 8, 1989).

least six months. *See* App. 25, 26-27. That resolution noted South Carolina's opposition to the transfer and offered up the Commission as a possible mediator that could enable both States to reach a solution to this interstate dispute through adoption of an interstate compact. *See* App. 27, 29-30. The Commission, however, operates in a purely advisory capacity and has no regulatory authority or any other authority to bind North Carolina or South Carolina. *See* App. 26. The EMC ignored the Commission's advisory recommendation, as well as the opposition of South Carolina, and granted the Cities' application on January 10, 2007.

SUMMARY OF ARGUMENT

The North Carolina interbasin transfer statute, and the transfers from the Catawba River authorized under that statute, are directly contrary to this Court's decisions with respect to interstate rivers. Those decisions make clear that North Carolina, as the up-river State, has no right to claim control over the entire flow of the Catawba River, but instead is under a duty to ensure that South Carolina, the down-river State, enjoys the benefits of the Catawba River as well. Because North Carolina has transgressed the bounds of its limited rights under federal law, this Court should accept jurisdiction over South Carolina's Complaint. Following the full development of the record, the Court should enter a decree equitably apportioning the Catawba River, declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River, and prohibiting all transfers by North Carolina — past and future — that are inconsistent with that apportionment.

To assist in this task, the Court should appoint a Special Master, as has been its customary practice in equitable apportionment cases. A Special Master would be well positioned to compile the record that is characteristic of this type of case and to make recommended findings of fact and conclusions of law with respect to the numerous

factors that this Court considers in applying the doctrine of equitable apportionment.

ARGUMENT

I. FEDERAL COMMON LAW PRECLUDES RESORT TO THE NORTH CAROLINA INTERBASIN TRANSFER STATUTE FOR RESOLUTION OF THIS DISPUTE

Because this case "deal[s] with . . . water in [its] . . . interstate aspects, there is a federal common law" that governs this dispute, which is one "upon which state statutes or decisions are not conclusive." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 105 & n.7 (1972). Indeed, this "federal common law exists" precisely because "state law cannot be used" to resolve disputes between States about the use of an interstate river. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) (recognizing that, in "interstate water disputes," "federal common law applies" and "our federal system does not permit the controversy to be resolved under state law"); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-10 (1938) (holding that "neither the statutes nor the decisions of either State can be conclusive" of the equitable apportionment under federal common law of an interstate river).

The North Carolina interbasin transfer statute "cannot be used" and is therefore irrelevant to the adjudication of this dispute. Instead, this case must be settled under federal common law, "on the basis of equality of right," recognizing the "equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931) (internal quotation marks omitted); *accord Kansas v. Colorado*, 206 U.S. 46, 97-100 (1907). As a result, the transfers from the Catawba River that North Carolina has previously approved cannot be presumed to be part of North Carolina's equitable share and North Carolina's statute should be declared invalid to the extent that it authorizes transfers in excess of North Carolina's

equitable apportionment as determined by federal common law. Under this Court's settled precedent, North Carolina has the burden of "present[ing] clear and convincing evidence in support of [those] diversion[s]." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).[7]

II. SOUTH CAROLINA IS ENTITLED TO AN EQUITABLE APPORTIONMENT OF THE CATAWBA RIVER, AND NORTH CAROLINA SHOULD BE ENJOINED FROM AUTHORIZING TRANSFERS FROM THE RIVER THAT ARE INCONSISTENT WITH THAT APPORTIONMENT

This Court has repeatedly held that "[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003); *see also Kansas v. Colorado*, 206 U.S. at 95-98. At the "root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). Instead, "States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Id.*

The North Carolina interbasin transfer statute, as drafted and applied by the North Carolina EMC, runs directly contrary to those principles. As shown above, the

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[7] *See Colorado v. New Mexico*, 467 U.S. at 317 (explaining that where, as here, the downstream State "has met its initial burden of showing 'real or substantial injury,'" the "burden shift[s]" to the upstream State "to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to [the downstream State] would be outweighed by the benefits to [the upstream State] from the diversion") (quoting *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)).

statute gives no meaningful consideration to South Carolina's uses and users of water that is transferred out of one interstate river basin and into another river basin within North Carolina. *See* N.C. Gen. Stat. Ann. § 143-215.22I(f). Moreover, the statute makes no provision for accommodating the competing needs of both States in the event of drought conditions or other water supply problems. On the contrary, the statute contemplates that the EMC will approve increased intrastate transfers to respond to such conditions, even though such transfers will necessarily reduce the water available to flow downstream to South Carolina. *See id.* § 143-215.22I(j). This Court has long rejected the principle, implicit in North Carolina's interbasin transfer regime, that "a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary." *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922).

Instead, this Court has repeatedly enforced the rule of equitable apportionment, which "is directed at ameliorating present harm and preventing future injuries to the complaining State." *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1028. The history of droughts and inconsistent flow that characterizes the Catawba River demonstrates that North Carolina's assertion of authority to transfer tens of millions of gallons of water daily out of the Catawba River — and the threat of further transfers in the future — imposes a serious and direct harm on South Carolina and its citizens. *See Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) ("deprivation of water in . . . semiarid regions cannot help but be injurious," particularly where there is "inadequacy of the supply of water to meet all appropriative rights"). South Carolina has an important sovereign interest in preventing the harms caused by North Carolina's appropriations of water. *See, e.g.*, *Colorado v. New Mexico*, 459 U.S. at 182 n.9. South Carolina also possesses a significant *parens patriae* interest to

protect her citizens from those same harms. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. at 616.

South Carolina, therefore, respectfully invokes this Court's jurisdiction to resolve its dispute with North Carolina by equitably apportioning the Catawba River.

III. THE COURT SHOULD APPOINT A SPECIAL MASTER

As the Court has commonly done in equitable apportionment cases, it should appoint a Special Master to take evidence and make a recommendation of the equitable apportionment of the Catawba River.[8] Equitable apportionment "calls for the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. at 618. In *Nebraska*, this Court provided "an illustrative not an exhaustive catalogue" of "relevant factors," which included:

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

Id.; *see also Colorado v. New Mexico*, 459 U.S. at 186-87 (listing factors); *Colorado v. Kansas*, 320 U.S. 383, 385 (1943) (same); *Connecticut v. Massachusetts*, 282 U.S. at 670-71 (same). Unsurprisingly, in light of the multifaceted inquiry involved, cases in which this Court has equitably apportioned interstate rivers have involved submission of "voluminous evidence."[9]

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[8] *See, e.g.*, *Colorado v. New Mexico*, 467 U.S. at 313; *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1018; *Arizona v. California*, 460 U.S. 605, 609 (1983); *Nebraska v. Wyoming*, 325 U.S. at 591, 617.

[9] *E.g.*, *Nebraska v. Wyoming*, 507 U.S. 584, 593 (1993); *accord, e.g.*, *Colorado v. New Mexico*, 467 U.S. at 313; *Wyoming v. Colorado*, 259 U.S. at 471; *Kansas v. Colorado*, 206 U.S. at 105.

Indeed, this Court routinely "appoint[s] a Special Master to develop the record" when the record as presented in an original action "is not sufficiently developed to permit [the Court] to address the merits." *South Carolina v. Regan*, 465 U.S. 367, 382 (1984) (plurality); *see also United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980) (explaining that, "[i]n exercising our original jurisdiction under Art. III, we appoint special masters" who are "generally charged to take such evidence as may be . . . necessary" and "to find the facts specially and state separately his conclusions of law thereon") (internal quotation marks omitted; ellipsis in original). The appointment of a Special Master is particularly appropriate in this case to enable a full development of the record relevant to the equitable apportionment of the Catawba River, and to make recommended findings of fact and conclusions of law on the basis of the States' factual and legal submissions.

CONCLUSION

For the foregoing reasons, this Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommendation to this Court of the equitable apportionment of the Catawba River between South Carolina and North Carolina.

Respectfully submitted,

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